STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal From The Michigan Court of Appeals
Honorable Bill Schuette, Presiding

HARTMAN & EICHHORN BUILDING CO., INC., a Michigan corporation,
Plaintiff/Counterdefendant,

v

STEVEN DAILEY and JANINE DAILEY, a married couple; and ABN-AMRO d/b/a STANDARD FEDERAL BANK, jointly and severally,
Defendants,

and

STEVEN DAILEY and JANINE DAILEY,
Counterplaintiffs/Third-Party Plaintiffs/Appellees,

v

JEFFRY R. HARTMAN, an individual,
Third-Party Defendant/Appellant.

Supreme Court Docket No. 129733

Court of Appeals Docket No. 249847

Oakland County Circuit Court
Case No. 01-032203-CK

APPELLANT, JEFFRY R. HARTMAN'S, REPLY TO APPELLEES, STEVEN AND JANINE DAILEY'S, BRIEF ON APPEAL

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TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

CASES **Page**

STATUTES

COURT RULES

OTHER

I. INTRODUCTION/STATEMENT OF FACTS

Pursuant to MCR 7.306(C), Third-Party Defendant/Appellant, Jeffry Hartman ("Hartman"), files this Reply Brief in response to the arguments in the Brief filed by Defendant/ Counterplaintiff/Third-Party Plaintiff/Appellees, Steven and Janine Dailey (the "Daileys").

Hartman incorporates by reference the Statement of Facts set forth in his Brief on Appeal. In response to the Daileys' Statement of the Issues Presented, Hartman reiterates that there are two issues before this Court, both of which are purely legal:

1. Are licensed residential builders, whose conduct is both authorized by and regulated by the State of Michigan pursuant to the Michigan Occupational Code, MCL 339.101 *et seq*, exempt from liability under the Michigan Consumer Protection Act when they are engaged in a regulated activity?

2. Are the corporate officers of licensed residential builders personally liable for claims under the Michigan Consumer Protection Act?

II. ARGUMENT

A. The Issues, As Framed Above, Are Properly Before This Court

The Daileys continue to argue, as they did to the Court of Appeals and in their Opposition to the Application for Leave to Appeal to this Court, that the issue of the "Exemption" [MCL 445.904(1)(a)] to the Michigan Consumer Protection Act ("MCPA") was not raised below and, therefore, *may not* be considered by this Court. The Daileys are factually and legally incorrect.

Factually, the Exemption issue was raised by the Daileys' counsel himself at the hearing on Hartman's Motion for Summary Disposition. The Daileys' counsel, citing *Forton v Laszar*, 239 Mich App 711; 609 NW2d 850 (2000), lv den 463 Mich 969 (2001), argued that the

threshold question in this case is whether the MCPA applies to residential builders. *Forton*, the very case law relied upon by the Daileys in the proceedings below, formed the basis for the Court of Appeals' Opinion. See, 5/26/05 Court of Appeals Opinion, Appellant's Appendix, pp 38a-45a. Accordingly, it is disingenuous, at best, for the Daileys to now claim that the application of the Exemption to Hartman should not now be considered by this Court.

Further, legally, the Daileys confuse the "obligations" of an appellate court and the "power" of an appellate court. This Court is empowered under MCR 7.316(A)(7) to "grant relief as the case may require."[1] "The jurisprudence of Michigan cannot be, and is not, dependent upon whether individual parties accurately identify and elucidate controlling legal questions." *Mack v City of Detroit*, 467 Mich 186, 209; 649 NW2d 47 (2002). Accordingly, the appellate courts may review issues, even if not raised below:

> . . . if a miscarriage of justice will result from a failure to pass on them, **or if the question is one of law and all the facts necessary for its resolution have been presented,** or where necessary for a proper determination of the case.

Blackburne & Brown Mortgage Co v Ziomek, 264 Mich App 615, 628; 692 NW2d 388 (2004), quoting *Brown v Loveman,* 260 Mich App 576, 599; 680 NW2d 432 (2004), quoting *Providence Hosp v Nat'l Labor Union Health & Welfare Fund*, 162 Mich App 191, 194-195; 412 NW2d 690 (1987) (citations omitted, emphasis added).

The question of the application of the Exemption to residential builders, when engaged in the regulated activity of constructing or altering a home, is a question of law and all facts necessary for its resolution have been presented. Further, the Court of Appeals decided the issue in

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[1] See also, *Paschke v Retool Industries*, 198 Mich App 702, 703; 499 NW2d 453 (1993), rev'd on other grounds 445 Mich 502; 519 NW2d 441 (1994).

a published opinion. This Court then accepted Hartman's Application, "limited to the questions involving the Michigan Consumer Protection Act's application to residential builders." See, Supreme Court Order, May 4, 2006. Accordingly, factually and legally, the issue of the Exemption is properly before this Court.

B. Pursuant To All Established Principles Of Statutory Construction, The Exemption Is Not, Contrary To The Daileys' Assertion, Limited To The Insurance Industry

The Daileys, citing the specific facts of this Court's decision in *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999), argue that the Exemption should be limited to insurance transactions because the insurance industry, unlike the residential building industry, is extensively regulated. This is not true, based on the plain language of the Exemption and as a factual matter. The rules governing the interpretation of a statute in Michigan are well-established.

> An anchoring rule of jurisprudence, and the foremost rule of statutory construction, is that courts are to effect the intent of the Legislature. To do so, we begin with an examination of the language of the statute. If the statute's language is clear and unambiguous, then we assume that the Legislature intended its plain meaning and the statute is enforced as written. A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.

Roberts v Mecosta County General Hosp, 466 Mich 57, 63; 642 NW2d 663 (2002) (citations omitted), after remand 470 Mich 679 (2004). The MCPA does not apply to:

> . . . a transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States.

MCL 445.904(1)(a).

There is nothing in the Exemption which supports the Daileys' argument that the Exemption is limited to insurance transactions. Instead, the Exemption applies where the general conduct at issue is regulated by this State or the United States. Here, residential builders are pervasively regulated by the Occupational Code (the "Code"), which is administered by the Residential Builders and Maintenance and Alterations Contractors Board (the "Board") of the Department of Labor and Economic Growth (the "Department"). The Board promulgates rules which set minimal standards of practice and interprets licensure and registration requirements and assesses penalties for violating the Code or Rules. MCL 339.307–MCL 339.317.

Individuals and principals of various entities to whom a builder's license has been issued are subject to numerous regulations. Among those things the Code and Rules prohibit are: failing to perform a contract in a workmanlike manner, failing to comply with the applicable building code and a willful departure from or disregard of plans or specifications in a material respect, without consent. MCL 339.2411(2)(m), (c) and (d). The Code also prohibits: (1) fraud, deceit, gross negligence, incompetence, a lack of good moral character and false advertising, MCL 339.604; (2) abandonment without legal excuse of a contract/construction project; (3) diversion of funds or property received for completion of a specific construction project or operation; (4) failure to account for or remit money coming into the persons's possession which belongs to others; (5) a willful violation of the building laws of the state or of a political subdivision of the state; (6) in a maintenance and alteration contract, failure to furnish to a lender the purchaser's signed completion certificate; (7) failure to notify the department within 10 days of a change in the control or direction of the business of the licensee; (8) failure to deliver to the purchaser the entire agreement of the parties; (9) failure to pay over immediately upon receipt, money received by the salesperson in

connection with a transaction governed by Article 24 to the residential builder or residential maintenance and alternation contractor under whom the salesperson is licensed; (10) aiding or abetting an unlicensed person to evade Article 24; (11) acceptance of a commission, bonus, or other valuable consideration by a salesperson from a person other than the residential builder under whom the person is licensed; and (12) becoming insolvent, filing bankruptcy, becoming subject to a receivership, failing to satisfy judgments or liens, or failing to pay an obligation as it becomes due in the ordinary course of business. MCL 339.2411(2).

A violation of any of the above allows a homeowner, the attorney general, the Department or a board to file a complaint with the Department. MCL 339.501, MCL 339.2411 and 1999 AC, R 338.1551. The Department prosecutes the case. MCL 339.502. In doing so, the Department may, among other things, require a builder to appear for an investigative conference and/or require a builder to appear and show cause why his/her license should not be revoked. MCL 339.503 and 1999 AC, R 338.1552 and 1999 AC, R 338.1553(3). Further, after an investigation has been conducted, a formal complaint, cease and desist order, notice of summary suspension or citation may be issued by the Department. MCL 339.504–MCL 339.507. A summary suspension or cease and desist order is in addition to all other remedies, including, but not limited to, criminal prosecution. MCL 339.507. In the event a formal complaint is issued, the builder is given a choice between: (1) an opportunity to meet with the Department to negotiate a settlement; (2) an opportunity to demonstrate compliance prior to holding a contested case hearing; or (3) an opportunity to proceed to a contested hearing. MCL 339.508.

If a builder elects to try and negotiate a settlement and those efforts prove unsuccessful, the matter will proceed to a formal administrative hearing. Moreover, even where a

builder reaches a settlement or resolution with the homeowner, the Department may (and does) continue proceedings against the builder and take disciplinary action and impose sanctions against the builder. 1999 AC, R 338.1553(3). These sanctions include license suspension, license revocation, civil fines, probation and restitution. MCL 339.602.

In sum, the Daileys are simply incorrect when they argue that: (1) the Exemption is limited to the insurance industry; and (2) that residential builders are not extensively regulated by the State of Michigan.[2]

C. The Out-Of-State Case Law Relied Upon By The Daileys Is Contrary To This State's Jurisprudence And That Of The Majority Of Other States

At pages 13-14 of their Brief, the Daileys rely upon South Carolina law to argue that this Court should reverse *Smith v Globe* on the issue of its interpretation and application of the "specifically authorized" language of the Exemption and adopt a more limited interpretation. Yet, the most recent South Carolina case relied upon by the Daileys has been called into question.[3]

Moreover, *in accordance with the law of other states*, in *Smith*, this Court stated:

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[2] Likewise, the Daileys' hypotheticals at page 15 of their Brief are not persuasive. First, resolution of these hypotheticals is not necessary for the Court to render its opinion in this case. Second, it may be, when the Daileys' hypothetical issues are reviewed by a Michigan court, that the defendant is regulated and the defendant's conduct does fall within the Exemption. However, that mere "possibility" does not change the plain language of the Exemption and its application to this case.

[3] In *Ward v Dick Dyer & Assoc*, 304 SC 152; 403 SE2d 310 (1991), the court stated that the purpose of the South Carolina exemption provision was to avoid conflict between the Trade Practices Act and other laws that made a particular act legal. *Id.* at 157. Yet, in *InMed Diagnostic Serv, LLC v MedQuest Assoc, Inc*, 358 SC 270, 277-278; 594 SE2d 552 (SC Ct App, 2004), the same court more recently stated that the purpose of the exemption was to allow expert administrative agencies to police their own area of regulation.

> Consistent with these rulings, we conclude here that, when the Legislature said that transactions or conduct "specifically authorized" by law are exempt from the MCPA, it intended to include conduct the legality of which is in dispute. Contrary to the "common-sense reading" of this provision by the Court of Appeals, we conclude that the relevant inquiry is not whether the specific misconduct alleged by the plaintiffs is "specifically authorized." Rather, it is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited.

Smith, 460 Mich at 465.

For example, the New Hampshire Supreme Court recently renounced its previous narrow construction of that state's Consumer Protection Act exemption, returning to the view that overall governmental regulation of a business activity entitles a defendant to claim the protection of the exemption for regulated conduct. *Averill v Cox*, 145 NH 328; 761 A2d 1083 (2000). Similarly, in *State v Piedmont Funding Corp*, 119 RI 695; 382 A2d 819 (1978), the Rhode Island Supreme Court construed a statutory exemption substantially similar to that found in the MCPA, stating:

> The question before this court is whether the activities of defendants were "permitted" by state and federal agencies as that term is used in section 4 of the Act and, therefore, exempt from the provisions of the Act. The plaintiff contends that section 4 does not exempt a business activity from the mandate of the Act simply because it is subject to governmental regulation unless the regulating agency has established that the manner in which the transaction was conducted is a proper way of doing business. We do not agree with this analysis.
>
> Section 6-13.1-4 reads as follows:
>
> Exemptions. Nothing in this chapter shall apply to actions or transactions permitted under laws administered by the Department of Business Regulation or other regulatory body or officer acting under statutory authority of this state or the United States.
>
> In interpreting this provision of the act, we follow the rule of construction which requires that the language in a statute be given its plain and every day meaning unless it is ambiguous. *Andreozzi v*

> *D'Antuono*, 113 RI 155, 158, 319 A2d 16, 18 (1974). Giving the language of s 6-13.1-4 its plain meaning, we conclude that the Legislature clearly exempted from the act all those activities and businesses which are subject to monitoring by state or federal regulatory bodies or officers.

Id. at 821-822 (emphasis added). Accord, *Kelley v Cowesett Hills Assoc*, 768 A2d 425, 431-432 (RI, 2001) (statutory regulation of asbestos abatement precluded unfair trade practice claim by consumer arising from same).[4]

As the above cases illustrate, this Court is not alone in its interpretation and application of the MCPA exemption. Rather, this Court's interpretation of the Legislature's intent in *Smith* is consistent with the holdings in other states. Accordingly, properly applied, *Smith* mandates the conclusion that residential builders are exempt from liability under the MCPA when engaged in an activity regulated by the Board. That is, the logic of *Smith* applies to the construction of a residential home because: (1) Article 24 of the Occupational Code regulates the conduct of residential builders; and (2) residential builders are regulated by the Residential Builders and

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[4] Other states have also concurred with *Smith* and its interpretation of statutory exemption language. See, *Ferguson v United Ins Co of America*, 163 Ga App 282; 293 SE2d 736, 737 (1982) (suit by beneficiary to recover life insurance proceeds barred by specific authorization and regulation of insurance under Georgia's insurance code); *First of Maine Commodities v Dube*, 534 A2d 1298 (Maine, 1987) (commission dispute between real estate broker and vendors; "[b]ecause by statute the Maine Real Estate Commission extensively regulates brokers' activities, including the execution of exclusive listing agreements, such activities fall outside the scope of Maine's Unfair Trade Practices Act and Consumer Solicitation Sales Act"); *Little v Gillette*, 218 Neb 271; 354 NW2d 147 (1984) (dispute over sale of fast food franchise by bank and real estate broker; "the exemption provision . . . is clearly stated and is applicable in the instant case. The bank is regulated by the Nebraska Department of Banking and Finance. Gateway is regulated by the Nebraska State Real Estate Commission. It is obvious that the appellee's invitation [to impose Consumer Protection Act liability] was directed to the wrong branch of government"); and *Irwin Rogers Ins Agency, Inc v Murphy*, 122 Idaho 270; 833 P2d 128, 134 (1992) (sale of insurance regulated by state agency, barring consumer protection claim).

Maintenance and Alteration Contractors Board. The Daileys have not demonstrated, based on two South Carolina cases, that the logic of *Smith* is now unsound and that *Smith* must be reversed.[5]

D. There Is No Personal Liability Under The MCPA

In response to Hartman's arguments regarding the lack of personal liability under the MCPA, the Daileys merely quote the Court of Appeals' Opinion and cite case law from Massachusetts and Missouri. At pages 22-31 of his Brief on Appeal, Hartman addressed the flaws in the Court of Appeals' Opinion and, therefore, will not reiterate them here.

In addition, at pp 32-34 of his Brief on Appeal, Hartman discussed the law in the states of Texas, Washington and New Hampshire – all of which did not find personal liability under their respective Consumer Protection Acts where, as here, the claims made in the lawsuit arise out of a contractual obligation. In fact, the *Standard Register* case, relied on by the Daileys, is distinguishable on this very point. In *Standard Register*, the Court initially cited Massachusetts case law ruling both ways on the issue of personal liability (depending upon whether the action was based more on contract or tort) and then made a factual determination that plaintiff's allegations sounded more in tort. In addition, the Court's finding of personal liability was, in part, as to non-parties to the contract. *Standard Register Co v Bolton-Emerson, Inc*, 38 Mass App 545, 548; 649 NE2d 791 (1995). These are not the facts here. The Daileys' allegations are based on Hartman's alleged failure to perform the Building Agreement – poor construction of the porch, structural I-beam, kitchen and

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[5] For this very reason, the Daileys' argument at pp 18-20 of their Brief, that Hartman's conduct was not "specifically authorized" and, thus, he is not exempt, is without merit. Again, "the relevant inquiry is not whether the specific misconduct alleged by plaintiffs was specifically authorized. Rather it is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited." *Smith*, 460 Mich at 465-466 (footnotes omitted).

siding, and failing to complete the project. See, Daileys' Counter-Complaint and Third-Party Complaint, Appellant's Appendix, pp 105a-110a. Moreover, the Massachusetts court's distinction between contract versus tort to determine individual liability under its Consumer Protection Act is contrary to Michigan's well-established law that: (1) where an express contract exists, no tort action will lie where there is no duty separate and distinct from the contract; and (2) agents are not liable for contracts they make on behalf of disclosed principals. *Hall v Encyclopedia Britannica, Inc*, 325 Mich 35; 37 NW2d 702 (1949).[6]

III. CONCLUSION AND RELIEF REQUESTED

For all the foregoing reasons, Third-Party Defendant/Appellant, Jeffry R. Hartman, respectfully requests that this Court reverse the Court of Appeals and reinstate the trial court's grant of summary disposition in his favor.

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[6] Likewise, the Missouri case is not on point. There, the Missouri court relied upon a definition of "person" which includes "agent, employee, salesman, partner, officer, director, member, stockholder, associate . . . ." Mo. Stat Ann § 470.010; *State of Missouri v Marketing Unlimited of America, Inc*, 613 SW2d 440, 447 (Mo App, 1981). Michigan's definition of "person" under the MCPA does not include "agent, . . . officer, director," etc. – further evidence that corporate officers should not be held personally liable under the MCPA.